IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 507 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

KAMLESH BAROT (SINCE DECEASED)

Appearance:

MR PG DESAI for Petitioner

MR TS NANAVATI, for Respondent No.2

RULE SERVED for Respondent No. 2, 9,10

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 22/10/1999

ORAL JUDGEMENT

Heard learned PP Mr. Desai for the petitioner State and Mr. TS Nanavati for Respondent no.2. Respondent nos. 4, 5, 6, 7 and 8 appeared in person and they are heard in person. Respondent nos. 9 & 10 have opted to remain absent though served.

This Cri.Rev. Application is filed by the complainant State of Gujarat against the order passed by

the learned Addl. Sessions Judge, Bharuch dated 22.9.1999 below application exh. 262 in Sessions Case No. 99/98 pending before him, rejecting the application exh. 262 filed by the learned APP, Bharuch preferred under sec. 311 of the Cr.P.Code . The State had prayed that three witnesses namely Bhupendra Prabhulal Shah (father of the victim boy Manish), victim boy Manish and witness Mahendra Prabhulal Shah be recalled for a limited purpose so as to identify the voice recorded in audio tape cassettes by police. Application exh.262 filed by the APP before the learned Sessions Judge is self-explanatory. It is the say of the State that these witnesses are competent to identify the voice recorded in the audio cassettes produced and proved by the witnesses who are examined in the Court. I am told that audio cassettes were kept with the Court as muddamal and three important witnesses are examined by the prosecution about the proof of it. Out of three, two important witnesses are Wireless Operator and FSL Expert. Deposition of P.W. Bhupendra Shah is recorded at exh.99 and the depositions of P.Ws. Mahendra Shah and Manish Shah are recorded at exh.130 and 136 respectively. Recorder of audio tape is examined subsequently. Expert is also examined subsequently. Learned PP Mr. P.G. Desai has submitted that because of bulky record and large number of witnesses, the prosecution has examined witnesses expeditiously in view of the order passed by the Court expediting the trial. The learned Addl. Sessions Judge, while passing the order, mainly relied on the endorsement made by the learned advocate appearing for the accused persons and submissions made on their behalf and held that the prosecution intends to prolong the trial and also wish to fill up the lacuna left by it. The another reason for rejecting application given by the learned Addl. Sessions Judge is that the prosecution should not be permitted to fill up the lacuna because the same will be prejudicial to the defence side.

According to the case of the prosecution, P.W. Manish Shah (exh.136) was kidnapped so that ransom amount can be extorted from his father and/or family members. Accused are facing charges of criminal conspiracy along with other charges. Audio cassettes are produced to prove the conversation between the accused and some of the prosecution witnesses who are examined by the prosecution side. I agree that cassettes were very well there before the Court as muddamal articles, but in reality, cassettes before the Court were documents. Recorder, if examined first and prosecution intends to get the voice identified after proving the formal recording of it, then, it cannot legally be said that the prosecution intends to fill up the lacuna. Even for the

sake of arguments, it is accepted that prosecutor was at liberty to play audio cassettes when above three witnesses were examined and prosecutor could have put certain questions as to the identification of the voices recorded in the cassettes and that prosecutor has missed that opportunity, even then, application to recall these witnesses under sec. 311 of Cr.P.Code, cannot be said to be an application moved with a view to protract the trial. The case of proving written document is slightly on different footing than the case where voice is to be identified recorded in audio cassettes. Such tapes are undisputedly documents. After examining the Recorder, grant of permission to recall certain witnesses for identification of voice cannot be equated with the act of filling up the lacuna. Bonafide missed questions are also, in the interest of justice, as stipulated in sec. 311 of Cr.P.Code, can be permitted to be asked to such witnesses. Careful reading of sec. 311 of Cr.P.Code reveals that while recalling the witness, the Court should evaluate the entire set of facts vis-a-vis the "interest of justice" and Court should see that such permission may not cause prejudice to the other side. At the same time, rejection of such an application, whether would cause prejudice to the prosecution is also a question which needs consideration.

The learned Addl. Sessions Judge has rejected the application relying on the decision rendered by this Court (Coram : H.R.Shelat, J) in the case of Kinit Jayantilal Amin & Anr. v/s State of Gujarat & Anr., on 10.5.1999 in Criminal Misc. Application No. 2355 of 1999. I have carefully gone through the said decision. In the said case, the prosecution had already closed evidence. Not only that lacuna which the prosecution intended to fill up, was such which was likely to prejudice the accused as Further Statement of the accused side under sec. 313 of the Cr.P.Code was already recorded. In the cases referred in the said decision, in most of cases, evidence was closed by the prosecution. The facts in the instant case are other way round. It would be just and proper to reproduce relevant observations made in para-4 of the said decision so as to see whether said decision applies to the facts of the present case or not. Para-4 of the said decision reads as under:-

> "4. In the application, no specific case is advanced and vaguely it is mentioned that for convenient disposal and also to place some facts brought to light subsequently on record Shri Pawan C. Tomar was required to be recalled. At the time of submission when I made query it was

made clear to me that to know what was the weight of the goods seized when sent to laboratory for analysis the witness was to be recalled, and further the statement of Rajendra Kamdar recorded was to be proved and tendered in evidence. It should be noted that such facts were very much there when the charge was framed and plea was recorded. It was in all respects possible for the prosecution to bring the same on record examining the concerned witnesses. The Investigating Officer is examined and the person who despatched the goods to laboratory is also examined. Mr. Tomar who is in know of despatch is no doubt examined but necessary question to bring all the aforesaid facts on record are not put to him. In view of the matter unequivocally it can be said that to fill up the lacuna that remained on record, application Ex.155 for recalling of Mr. Tomar has been filed, and not for the just decision of the case. When that is so, the powers under sec. 311, Cr.P.Code cannot be exercised, for the court cannot become the agent of the party i.e. prosecution exercising the power and affording the opportunity to the prosecution to fill up the lacuna. The Court, without any further facts on record, can well appreciate the evidence already there on record and without any difficulty or confusion, determine the points that have arisen for consideration because the evidence is clear, comprehensive & unambiguous. Every possible link is brought on record. Availing of the opportunity, prosecution, to the best of its ability, led the evidence. If it has missed to bring some thing on record, the Court u/s 311 cannot help it, because to do so would amount to Court's becoming the agent of the prosecution. Further, entire hearing is over. The case is adjourned for pronouncement of judgment. To allow such application at such stage would amount to miscarriage of justice. For such reasons, therefore, the application is required to be allowed and the order of the Lower Court is liable to be quashed. I may, in support of my view, refer some decisions."

From the above observations, it is crystal clear that no specific case was advanced and vague averments were made in the application under sec.311 of Cr.P.Code at the stage when entire hearing in that case was over and the case was adjourned for pronouncement of judgment. That

is not the case here. Here, entire hearing is not over. Statement of accused under sec. 313 of Cr.P.Code is not recorded. At the time of filing application, Investigating Officer was not examined by the prosecution and persons who have proved recording audio cassette were also examined subsequently to the above three witnesses who are required to be recalled. Expert has also opined subsequently because his deposition is also recorded subsequently to the recording of the depositions of the aforesaid three witnesses.

It is accepted principle of law that if any error is committed by the Investigating Officer, then at the time of evaluating the case of the prosecution, normally the Court should ignore flows of Investigating Officer and the case of the prosecution should not be viewed with prejudice only on the count that procedural error is committed by the Investigating Officer. The same principle can apply in cases where some procedural error is committed by the Prosecutor at the time of conducting the trial before the Court. Ultimately, the Prosecutor is the Officer of the Court and assists the Court in tracing out the true facts. Here in this case, the prosecutor had applied that particular witnesses require to be re-called as he intends to put certain questions with regard to voices recorded in audio cassettes. More than one witness has said that audio cassettes do bear voice of other witnesses or the voice of a person or persons whose voice can be identified by these witnesses and so if witnesses are re-called and re-examined for this limited aspect, then it would not be proper to say that the case of the accused will be prejudiced.

Mr. B.Y.Mankad, Ld.APP appearing for the State has, in view of aforesaid facts and circumstances of the case, has rightly relied on the decision of the Apex Court in the case of Rajendra Prasad v/s Narcotic Cell through its Officer-in-charge, Delhi, reported in AIR 1999 SC 2292 and submitted that re-examination of prosecution witnesses cannot be permitted merely for filling up lacuna in prosecution evidence, but mistakes or laches in conducting case by public prosecutor cannot be understood to mean lacuna in prosecution case. He has relied on paras- 6,7 and 11 of the judgment which read as under :-

> "6. It is a common experience in criminal Courts that defence counsel would raise objections whenever Courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the Court could not "fill the lacuna in the prosecution case". A lacuna in prosecution is not to be equated with

the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are proned. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a Court cannot fill up.

7. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

11. We, cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, nor can the power be withheld down merely on the ground that prosecution discovered laches only when the defence highlighted them during final arguments. The power of the Court is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary for a just decision. The steps which the trial Court permitted in the case for re-summoning certain witnesses cannot therefore be spurned down nor frowned at."

According to the facts of the case before the Apex Court, it was the case of some negligence on the part of the Prosecutor, but here the case is slightly on different and better footing. Recorder of the statement was not examined on the day on which these three witnesses were examined by the prosecution. Even for the sake of arguments it is accepted that some lacuna had remained, but till the daate of application Exh.262 the prosecution had not closed the evidence. The Apex Court

has analysed word "lacuna". In view of above clear verdict of Apex Court, I am of the view that application filed by the PP to recall three witnesses named in the application exh.262 requires to be granted. Every error even if committed, by the prosecution agency cannot termed as a " lacuna " and ultimate interest of justice should be kept in mind while dealing with such contingency. That is what was and is the intention of the legislature while engrafting sec. 311 of Cr.P.Code so that nobody should be prejudiced on technicalities and ultimately the justice must prevail.

For the reasons aforesaid, Cri. Revision Application is allowed. Impugned order dated 22.9.1999 passed by the learned Addl. Sessions Judge below application exh.262 in Sessions Case No. 99/98 rejecting the application is hereby quashed and set aside. Application exh.262 is allowed. Ld. Addl. Sessions Judge concerned is directed to issue summons for re-calling the witnesses named in the application exh.262 for the purpose enumera

the sessions case on merits and in accordance with law. Rule is made absolute accordingly.

I am told by ld. counsel Mr. A.D.Shah that the trial is fixed on 25th October, 1995. Hence, Office is directed to communicate this order to the Sessions Court concerned telephonically so that appropriate steps can be taken by the Court concerned.

22.10.1999 [C.K. BUCH, J]

*rawal

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Appearance:

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MR TS NANAVATI, for Respondent No.2

RULE SERVED for Respondent No. 2, 9,10

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 22/10/1999

OPERATIVE PORTION OF ORAL JUDGEMENT

For the reasons aforesaid, Cri. Revision Application is allowed. Impugned order dated 22.9.1999 passed by the learned Addl. Sessions Judge below application exh.262 in Sessions Case No. 99/98 rejecting the application is hereby quashed and set aside.

Application exh.262 is allowed. Ld. Addl. Sessions Judge concerned is directed to issue summons for re-calling the witnesses named in the application exh.262 for the purpose enumerated therein and thereafter proceed with the sessions case on merits and in accordance with law. Rule is made absolute accordingly.

I am told by ld. counsel Mr. A.D.Shah that the trial is fixed on 25th October, 1995. Hence, Office is directed to communicate this order to the Sessions Court concerned telephonically so that appropriate steps can be taken by the Court concerned.

22.10.1999 [C.K. BUCH, J]
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